In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1708

VIVIEN KELLEMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an unmarried taxpayer, brought this action in the United States Tax Court challenging the constitutionality of the "income-splitting" provisions of Sections 1 and 2 of the Internal Revenue Code of 1954, 26 U.S.C. (1964 ed.) 1 and 2, principally on the ground that the resulting differential between the effective tax rates imposed on single individuals and married persons filing joint returns amounts to a denial of equal protection of the law. The Tax Court upheld the statute as constitutional (Pet. App. 1a-7a) and the court of appeals affirmed *per curiam* (Pet. App. 7a-8a). Petitioner renews her constitutional challenge here.

1. Prior to 1948, married individuals in community property states, unlike married persons living elsewhere, were entitled to divide their incomes between them for federal income tax purposes and thereby achieve, due to the operation of the progressive rate structure, a

reduction in their total tax liabilities. Compare *Poe* v. *Seaborn*, 282 U.S. 101, with *Lucas* v. *Earl*, 281 U.S. 111. Statutory income-splitting was enacted to correct this disparity of income tax treatment based solely upon state of residence, a disparity inconsistent with fundamental principles of federalism. See H. Rep. No. 1274, 80th Cong., 2d Sess. 21-24; S. Rep. No. 1013, 80th Cong., 2d Sess. 22-25. Cf. *Fernandez* v. *Weiner*, 326 U.S. 340. This objective alone provided ample reasonable legislative basis for the statute petitioner challenges, and the statute has previously been sustained against constitutional challenges. *Faraco* v. *Commissioner*, 261 F. 2d 387 (C.A. 4), certiorari denied, 359 U.S. 925.

Moreover, Congress cannot be said to have acted unreasonably in treating a husband and wife as if in fact their joint incomes were shared between them. Congress could reasonably assume that a married couple functions as an economic unit and may be most appropriately taxed as if each spouse contributes jointly to the production of income. Furthermore, as the Tax Court noted, Congress could have reasonably concluded that "married persons generally have greater financial burdens than single persons" (Pet. App. 5a) and "[t]he recognition of such greater burdens is certainly consonant with taxation based on ability to pay" (Pet. App. 5a-6a).

To be sure, the income-splitting device may foster some disparities. But "[n]o scheme of taxation * * * has yet been devised which is free of all discriminatory impact." *San Antonio Independent School District* v. *Rodriguez*, No. 71-1332, decided March 21, 1973, slip op. 37. Because of the progressive rate structure and the problem posed by community property laws, any rule will appear to penalize married couples in some cases or to impose greater tax burdens on single persons in others. Given the inherent complexity of the problem, the taxing scheme adopted by Congress in 1948 and refined in a series

of subsequent reforms,[1] while not perfect, nonetheless satisfies the requirements of due process and equal protection.

2. Petitioner argues (Pet. 5, 7, 21) that the decision below conflicts with *Moritz* v. *Commissioner*, 469 F. 2d 466 (C.A. 10), certiorari denied, No. 72-1298, May 21, 1973. There is no conflict. *Moritz* involved a constitutional challenge to Section 214 of the Code which, prior to 1972, allowed a limited deduction, for expenses incurred in the care of dependents, to "a taxpayer who is a woman or widower, or * * * a husband whose wife is incapacitated or is institutionalized," but did not allow such a deduction to a man who had never married. In extending the benefits of Section 214 to unmarried males, the Tenth Circuit reasoned that the statute "made a special discrimination premised on sex alone, which cannot stand." 469 F. 2d at 470.[2] Cf. *Frontiero* v.

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[1] Over the years, some of the benefits of income-splitting have been granted to single taxpayers who qualify as a "head of household" (Section 1(b)(2)) or a "surviving spouse" (Section 2(b)(1)). Moreover, the rate structure applicable to the year here in issue was revised substantially by the Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487. Section 1(c) of the Code now provides a new, lower rate schedule for unmarried individuals to insure that the tax paid by a single person will never be more than 20 percent greater than that paid by a married couple with the same taxable income. As a result of these reforms, however, new disparities have arisen; for example, the total tax liability of two single persons who earn similar amounts of income is now less than that of a married couple with the same aggregate income. Congress is continuing to re-examine the problem. See Hearing on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, before the House Committee on Ways and Means, 92d Cong., 2d Sess.

[2] Petitioner erroneously states (Pet. 7, n. 4) that the male taxpayer in *Moritz* was the victim of a classification "based solely on his lack of marital status." Had Mr. Moritz been married, he would not have been allowed to deduct the expenses

Richardson, No. 71-1694, decided May 14, 1973; *Reed* v. *Reed,* 404 U.S. 71. Since the income-splitting provisions of the federal tax rate structure do not discriminate on the basis of sex, the reasoning in *Moritz,* as the court of appeals correctly concluded (Pet. App. 8a), is "inapposite."

Petitioner also mistakenly asserts a conflict (Pet. 5, 7, 9) with *Hoeper* v. *Tax Commission,* 284 U.S. 206. The issue in *Hoeper* was the constitutionality of requiring a husband to report as his own the income of his wife over which he had no title or control. The issue petitioner raises is entirely different. Moreover, it is clear here that petitioner was taxed only on income actually belonging to her, and therefore that her claim that her tax was invalid under the Sixteenth Amendment is without merit.[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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for the care of his aged mother unless his wife was incapacitated or institutionalized. Had he been a woman, however, the expenses would have been deductible provided they were incurred to enable the taxpayer to be gainfully employed.

[3] Petitioner's argument under the Sixteenth Amendment is apparently premised on the belief that she is paying a penalty for not being married, *i.e.,* that a portion of her tax is on not her income but her single status. But it is not even clear that petitioner would pay lower taxes if she were married; indeed, the net tax on her own income would be higher if she married a man who himself had a substantial income.